Central Law Journal.

ST. LOUIS, MO., AUGUST 21, 1903.

WHEN A CLAIM OF MARRIAGE BASED UPON A "SECRET MARRIAGE RELATION" WILL BE SUSTAINED AFTER THE DEATH OF ONE OF THE PARTIES TO SUCH ALLEGED RELATION.

In the statement of the subject of this editorial we mean to lay no special importance on the limitation therein expressed, beyond the desire to confine our inquiry to cases where a claim of marriage is made *after* the decease of one of the parties to the alleged agreement, generally, for the purpose of establishing a claim to the decedent's estate.

No subject of equal importance in the law has received less discriminating consideration than the question now before us. While the books are full of the reports of cases bearing on the presumption of marriage based on cohabitation and reputation, they do not distinguish between a marriage where the parties have lived openly for years under claim of marriage, and had children which would be illegitimated by a decree denying the validity of the relation and what is known as a "secret marriage relation" which begins, possibly, in a meretricious union and embraces all the ear-marks of such a relation, until the death of one of the parties, when it suddenly blossoms out into a valid marriage, and the claimant, if she is the alleged wife, quickly discovers the propriety of assuming the name of the former partner of her bed and of holding herself out to the world as the wife of him who was ashamed to acknowledge her as such during his lifetime, except possibly to strangers or whenever it was more convenient to do so for the purpose of frequenting respectable hotels. It is to this latter relation that we desire to direct our inquiry, and endeavor to show that the tendency of the law is to deny the validity of a claim based upon such relation.

A "secret marriage relation" is, as we have suggested, usually a meretricious one, and, whether it is so or not is known generally only to the parties themselves. Such relation is generally assumed for only one purpose—sensual gratification—and both parties recognize it as such. In most cases the man's family and friends know nothing about the relation; in fact, decedent often ostensibly resides with his family, or in bachelor apartments, visiting his mistress at certain regular or occasional intervals, and acknowledging her as his wife only in sport among themselves or to her own immediate family or at places where to do otherwise would mean a denial of the pleasures he is seeking. It is a farce to call such a relation a marriage. It is hard to conceive that any sensible or virtuous girl would consider herself married under such circumstances, and certainly it will not be contended that any man would expect such a result to follow. And what the parties, by their actions, deny, the law will not affirm. It was said in Becking's Appeal, 2 Brewst. 202: "A man may live with his kept mistress in such a way as to create a kind of repute of marriage among some persons; may, in order to gratify her, hold himself out to her acquaintances as her husband; may be a constant visitor, and often eat and sleep at her house; may recognize the fruit of the connection as his children and manifest affection for them; and yet the evidence fall far short of that which ought to satisfy the mind that there was an actual agreement to form the relation of husband and wife." This language is quoted with approval in the recent case of McKenna v. McKenna, 180 Ill. 577.

In this last case cited, McKenna v. McKenna, *supra*, the facts were apparently strong in favor of marriage. Cohabitation was, on the testimony of the alleged wife, only permitted when her alleged husband promised to consider her as his wife. From that time, however, their meetings were clandestine. He never acknowledged her as his wife to his relations or business associates, nor did he take up any permanent abode with her. At hotels and in certain other places he acknowledged her as his wife, but only for convenience. The court said: "The relations between these parties were never disclosed by defendant in error to his most intimate friends, as they regarded him as a bachelor. His business associates, who dealt with him in real estate transactions, where he executed deeds and mortgages, regarded him as a bachelor, and he executed them as a single person. He always boarded at the hotels where he was employed, though he occupied the same bed with plaintiff for many years. There is evi-

dence that he introduced plaintiff to persons as his wife. It also appears that he paid her rent and expenses the greater part of the time from 1871 to 1890. He addressed letters to her as Mrs. James McKenna, when she was pregnant, to protect her reputation among her friends. Much of the evidence, however, is conflicting in many particulars. The cohabitation was not continuous and uniform. Sometimes they were living together. Then again, she was boarding by herself for a year or more and he lived at a hotel, both living as single persons. After carefully considering the evidence in the record, we are impressed with the idea that instead of these persons cohabiting as husband and wife, and holding themselves out to the world as such, there was a constant effort to conceal what they must have believed was an illicit cohabitation. The reputation, at least, is divided and is not sufficient proof of marriage."

It is not possible to review the authorities critically, as each case must necessarily depend upon its own facts and attending circumstances. Certain rules, however, are well established and should be clearly borne in mind in passing upon questions of this character. In the first place it is universally held by all the authorities that where it appears that the intercourse between the parties was originally illicit, it will be presumed that the intercourse continued to be illicit. This presumption is one of fact in most states; in Missouri it is a presumption of law. Cargile v. Wood, 65 Mo. 511. Another well settled rule is that neither cohabitation nor reputation of marriage, nor both, is marriage. When conjoined they are evidence from which a presumption of marriage arises. Sufficient proof of cohabitation and reputation, therefore, is the pivotal point in this class of cases. As to cohabitation, it is not a sojourn, a habit of visiting, nor a remaining with for a time, but is the state of having the same habitation, so that where one dwells, there the other dwells with him. Yardley's Estate, 75 Pa. St. 207. As to reputation, it is not that repute which the parties have among the necessary attendants at places where they indulge their amorous desires, but among their relations, friends and business associates. Therefore, where the subsequent relations of the parties appear to be somewhat clandestine, and are kept concealed from relations and all except servants, physicians, and others so employed, who will necessarily discover that the relation is illicit, unless made to believe that the parties are married, the evidence is insufficient to prove marriage. *In re* Terry's Estate, 58 Minn. 268. A necessary corollary to the rule last stated, is that a conflicting, uncertain or divided reputation is not sufficient to warrant the inference that a marriage had taken place. The relation must be undisputed at all times and in all places openly admitted by both parties. Powers v. Charmbury, 35 La. Ann. 630; Arnold v. Chesebrough, 58 Fed. Rep. 833; Ashford v. Insurance Co., 80 Mo. App. 638. As was said in the case of Yardley's Estate, *supra*, "an inconstant habitation and a divided reputation of marriage, carry with them no full belief of an antecedent marriage as the cause. The irregularity in these elements of evidence is at once a reason to think there is irregularity in the life itself the parties lead, unless attended by independent facts, which aid in the proof of marriage. Without concomitant facts to prove marriage, such an irregular cohabitation and partial reputation of marriage, avail nothing in proof of marriage."

Another interesting phase of the question before us relates to the competency of either of the parties to the alleged contract to testify. It is understood, of course, that in this editorial we are confining our discussion to cases when one of the parties to the alleged agreement is dead. There is a fascination about a large estate left by some generous hearted man of the world that seems to give birth to claimants from all sides who allege that they stood in certain relations to the deceased or performed certain services for him in his lifetime for which they ought to be compensated. And no claimant is more persistent than the woman who suddenly finds herself made a widow by the death of the decedent and who makes such haste to assert and prove that relation that she even forgets to attend the funeral or lay a wreath upon the grave. It is in protection of estates from such claimants that the legislatures in most of the states, when they lifted the common-law embargo on the right of interested witnesses to testify, excepted the case where one of the parties to a transaction or contract sued upon is deceased; the rule being that where

the mouth of one party to the contract is closed by death, the mouth of the other will be closed by law. It seems strange that in the great mass of litigation on the particular question before us, objection has not been made by attorneys to the right of the claimant to testify, and if such objection were made why it was not carried into the appellate court on appeal.

In arriving at a proper solution of the question whether an alleged wife can testify as to the validity of her marriage contract with a deceased person in any given case it must be determined whether she will probably be pecuniarily benefited herself and the estate of the decedent proportionately decreased by the character of the evidence which she gives. Thus, if the action is between third parties and the validity of her marriage is in controversy, a wife is a competent witness for the reason that she is not interested pecuniarily in the outcome. Greenewalt v. McEnelley, 85 Pa. St. 352. In this case a child of the witness was in danger of losing its inheritance by reason of plaintiff's claim that it was illegitimate. The interest of the mother in her child was held not to be such interest as disqualified her from testifying. This case was subsequently approved in Drinkhouse's Estate, 151 Pa. St. 294. This case was similar to the former, being an action by children of the witness to prove their legitimacy and share in the estate of their alleged father. The mother of the children, in such case, had evidently no direct pecuniary interest and could testify. In Missouri, however, the court in an *obiter* remark which it justifies by no explanation, holds that an alleged wife seeking a share of decedent's property as his widow is not within the meaning of the statute denying the right of an interested witness to testify to a contract or cause of action where the other party thereto is dead. The remark was not necessary to the decision and one of the judges distinctly goes on record as not desiring to express any opinion on the competency of the alleged wife as a witness in her own behalf. Green v. Green, 126 Mo. 17. This decision was followed by the court of appeals in that state in the case of Ashford v. Insurance Co., 80 Mo. App. 638, where it was held that a beneficiary in a life insurance policy was a competent witness as to her marriage with deceased. In Illinois this question has ween thoroughly considered. The case of Pigg v. Carroll, 89 Ill. 205, may be classed with the two Pennsylvania cases already cited. This was a controversy among heirs over the distribution of an estate in which the widow was allowed to testify. In Ebert v. Gerding, 116 Ill. 216, it was said that the statute was intended to protect the estates of deceased persons from the assaults of strangers, and relates to proceedings wherein the decision sought by the party testifying would tend to reduce or impair the estates. In Brown v. Brown, 142 Ill. 409, the court seemed to have forgotten its former rulings, and held that where there was no record of a marriage required to be kept, and where the justice and all persons present at the marriage were dead, the wife was a competent witness to establish the fact of marriage. In the recent case of Laurence v. Laurence, 164 Ill. 367, the Supreme Court of Illinois had the question squarely before it, and, after expressly overruling the case of Brown v. Brown, *supra*, distinctly holds that one who, as the alleged widow of a deceased person, is prosecuting a suit, against which her adversaries are defending as heirs, is not competent to testify in her own behalf until the fact of her marriage is proved or conceded, nor, in such case, is she competent to prove the marriage itself.

There could seem to be little controversy as to the correctness of the rule laid down by the Supreme Court of Illinois. If there is any time when the mouth of a party to a contract with a deceased person should be closed, it is when a party seeks to establish the relation of marriage against such deceased person in order to share in his estate and deprive his relatives and possibly his children by a deceased wife, of a part of their inheritence. Such claims are so easily manufactured, arising, as they do, so readily out of the indiscretions and foolish indulgences of the deceased in his lifetime, while at the same time they are so difficult to meet on the part of relatives and heirs especially in cases where they know nothing of the alleged relation, and, in the absence of deceased, know hardly where to turn for evidence to rebut the claim. It is undoubtedly to resist such assaults upon the estates of deceased persons that the statutes

announcing this rule have been passed, and the courts should not deprive the rule of its great power to resist fraud in this class of cases—cases founded upon claims growing out of some "secret marriage relation" alleged to have been sustained by the deceased to the claimant, and in which the latter is pecuniarily interested.

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATIONS—REIMBURSEMENT OF POLICEMAN FOR DAMAGE CAUSED IN ATTEMPTING TO REMOVE A NUISANCE.—While attempting to shoot a mad steer running at large in the streets of St. Louis, the chief of detectives shot a citizen, who was also on the street. A personal judgment was recovered for the injury so inflicted. The city passed an ordinance for the relief of the chief of detectives, which was attacked as being a donation of public money to an individual, and in contravention of the constitution of Missouri. The court holds, in State v. St. Louis, 73 S. W. Rep. 623, that such an ordinance, carrying an appropriation for the expenses incurred and paid by an officer while in the discharge of his duty, as expressly required by law, should be upheld. In passing upon the incident which resulted in the injury the court says: "There was, apparently, on hand, no gaily attired matadore, with red shawl and keen-edged sword, to remove the animal with neatness and dispatch, nor was there a Bossie Mulhall to lasso and tie the steer with speed and grace. It does not appear from the record how it fell out that the chief could hit a boy on the opposite side of the street while leaning out of a window and shooting at a steer in the street below him." The court says that such a remarkable exhibition of marksmanship would be simply inconceivable but for the fact that the verdict of the jury so declared. The incident speaks volumes of praise for the spirit of obedience to orders, and proves most conclusively that brains, and not bullets, are necessary to make a successful detective.

NUISANCE—IS THE COOKING OF ONIONS A NUISANCE PER SE.—The humors of the law are not always to be found outside of the reports, nor are the latter the dull, insipid pages they are usually alleged to be. Very often their pages will sparkle with humor and glow with eloquence. A recent case from Indiana illustrates these exceptional occurrences. Shroyer v. Campbell (Ind. App.), 67 N. E. Rep. 193. In this case plaintiff occupied the front part of a large house as a store. In the rear room lived the defendant. The plaintiff charged that defendant cooked in the same rooms he occupied and that the odor, especially from the cooking of onions and cabbage, injured plaintiff's business for which he asked damages. The court said:

"The statute, section 290, Burns' Rev. St. 1901, provides that 'whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property is a nuisance and the subject of an action.' There is evidence of the existence of the acts complained of, and that they come within the scope of this statutory provision. Much of the argument in appellant's brief is upon the evidence, but we cannot interfere with the court's conclusion upon the weight of the evidence. We quite agree with counsel for appellant that cooking is not a nuisance *per se*. Nor can it be said that the cooking of onions and cabbage is necessarily a nuisance. And we find nothing in the decree that will prevent appellant from indulging his taste in this respect in such a way as he may see proper. But we are not prepared to say that under no circumstances could a person be prevented from permitting odors and vapors from a kitchen to escape into an adjoining building or room. 'The corruption of the atmosphere,' says the author of Wood on Nuisance, § 494, 'by the exercise of any trade, or any use of property that impregnates it with noisome stenches, has ever been regarded as among the worst class of nuisances, and the books are full of cases in which any use of property producing these results has been regarded as noxious, and a nuisance, whether arising from the exercise of a trade, or business, or from the ordinary, or even necessary, uses of the property.'"

CONTRACTS—AGREEMENT FOR CONTINGENT COMPENSATION FOR PROCURING GOVERNMENT BUSINESS AS AGAINST PUBLIC POLICY.—The federal government has been exceedingly jealous of the policy of its business departments and has adopted every practicable rule to avoid even a temptation to corruption. One thing it particularly abhors is the practice of claimants against the government or persons seeking to do business with it employing attorneys or agents on a basis of contingent compensation. It is still remembered what a storm of federal disapproval arose against the Southern Methodist Church when it became known that the attorney prosecuting their claim for war losses was to receive one-third of the whole amount as his fee. The federal courts likewise view with stern disapproval the giving of contingent compensation to agents for obtaining business from the federal government. Tool Co. v. Norris, 2 Wall. (U. S.) 45; Oscanyan v. Arms Co., 103 U. S. 261.

The state courts, however, are not inclined to see anything in such contracts so very detrimental to the interests of the government. Thus in the recent case of Swift v. Aspell, 82 N. Y. Supp. 659, the court held that a contract to pay a commission to an agent for procuring orders for supplies for government vessels, to the extent of one-half of the net profits, is not void as against public pol-

icy; that employment of an agent to sell goods to the government is valid, where such agent was not expected to, and did not, resort to improper methods. The court in this case said:

"A person having something to sell has the right to sell it through an agent, and this right is an incident to his ownership. To declare that he may not employ an agent, upon commission, where the government is the prospective buyer, is to take away what is ordinarily one of the elements of the enjoyment of ownership—the unrestricted right to sell. * * * For all that appears or is to be inferred here, the plaintiff was expected to, and did, resort to none but the most legitimate methods in procuring these orders for the defendant's goods. Within the rule which, as I have said, obtains in this state, personal solicitation was quite proper, and jealous suspicion of the possibility of corruption cannot be invoked to repudiate the contract. The fact that the defendant was willing to pay one-half the net profits contains a suggestion less sinister than that found in the agreement to pay 10 per cent. of the gross price received, which was the promise upheld in Lion v. Mitchell, and 36 N. Y. 235, Am. Dec. 502, the measure of the commission in the present case does not necessarily mean that the government must have been overcharged in the usual course of business. If there was a custom in the trade whereby all vendors of such supplies in large quantities were put to the necessity of so fixing their prices as to enable them to pay large commissions to agents, the government would have to pay the prices thus fixed by all available sellers. The mere agreement to pay a large commission from net profit does not mean that the buyer was necessarily to pay more than the value of the goods under normal trade conditions." See also to same effect: Paving Co. v. Botsford, 56 Kans. 532.

STATE LAWS IN FEDERAL COURTS.

Over and above the function and jurisdiction of the federal courts, which are implied by their very creation, there is another which, so far as I know, has existence in no other jurisprudence of the world. A court not having jurisdiction to administer the laws of its own sovereign is, of course, an unthinkable thing. So, a court having jurisdiction to administer laws not of its sovereign, and independently of the sovereign whose laws are to be administered, is, if not also unthinkable, at least most extraordinary.

The feature of federal jurisdiction which attaches to controversies depending for their solution on the consideration of state laws, made or recognized in the rightful exercise of state sovereignty, is a relation to the state which the supreme court describes as "peculiar." Also says the court "the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference between co-ordinate courts."[1]

Anomalous and Inconvenient Results.—Inasmuch as in the case from which these excerpts are made and in another, in which they are approvingly repeated,[2] state construction is disregarded, it may require further definition for us to understand clearly what are "anomalous and inconvenient" results, against which protection is found in this "mutual respect and deference."

Other justices regarded such variance as "unseemly conflict," and that it was "productive of the greatest mischief and confusion."[3] Another thought the right of a state to fix construction of its own laws was "as necessary to the harmonious working of our complex system of government as the correlative proposition, that to this (Supreme) court belongs the right to expound conclusively for all other courts the constitution and laws of the federal government."[4] Still another believed that the refusal to follow state construction of its own laws, whether statute or common, was "an invasion of the authority of the state, and, to that extent, a denial of its independence."[5]

Co-ordination and Subordination—the Difference Between.—Whatever be the relation the constitution intended the judicial power of the nation should bear to the states, when extended to controversies controlled by state law, it must be admitted that there is the widest difference between its being independent and co-ordinate with or subordinate to, state courts. In the latter relation it would amount to usurpation of authority for a federal court to contravene or disregard state construction, while in the former the suitor becomes entitled to the court's own judgment, let the consequences be what they may. In the one relation harmony should he the rule, but in the other it would be chimerical to hope for it.

[1] Burgess v. Seligman, 107 U. S. 20.
[2] Railroad Co. v. Baugh, 149 *Id.* 368.
[3] Beauregard v. New Orleans, 18 How. 497-502.
[4] Gelpcke v. Dubuque, 1 Wall. 175-210, dissenting opinion by Miller, J.
[5] Railroad Co. v. Baugh, *supra*, dissenting opinion by Field, J.

Purpose of Jurisdiction to Secure Impartiality.—I will instance some expositions of the constitution in opinions of eminent members of the court to see, if we may, what they regarded this relation to be.

Marshall said: "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence, the possible fears and apprehensions of others, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."[6] Story broadly asserts, that no other reason can be assigned for not leaving such cases, "to the cognizance of the state courts."[7] Johnson thought, that by removal "the cause with all its existing advantages, is transferred to the Circuit Court of the United States," where justice is administered "to conform, as nearly as practicable, to the administration of justice in the courts of the state."[8] McKinley, Taney, Campbell and Grier announce the purpose to be impartiality.[9] It remained for Justice Bradley to add an additional reason in the protection of a suitor againt the influence of "sectional views."[10] What may be covered by this blanket, or entered by this wedge, as one may choose to term it, it may take more than human ken to foresee. Field reached the conclusion that "it was never supposed that there could be one law when a suitor went into the state courts, and another law when the suitor went into the federal courts, in relation to a cause of action arising within the state."[11] The view of Campbell is, that in such cases "the relaion of the courts of the United States to a state, is the same as that of its own tribunals,"[12] and time and again has it been held that state construction, fixed and received, is taken as part of the law itself, even though this may involve us (the Supreme Court) in seeming inconsistencies, as where states have adopted the same statute and their courts differ in construction."[13]

Dactrine Evolved.—Nevertheless when the court had been making history for more than a century it evolves the conclusion, announcing its first declaration in the beginning of the latter half of that period, that, where the law of the state is not in the form of a statute, nor springs from local usage or custom, or has not become a rule of property, but is determie by the principles of the common law, it becomes, according to classification by the court, "general law," which is subject to its independent judgment, uncontrolled by state construction.[14]

State's Common Law.—It is not claimed in any way, that a state's common law may be distinguished from its (following the court's designation) "local law" as to operation in the state, or that it is of extraterritorial force any more than statutes or usage or custom, or that it is not as completely under legislative control as to amendment or repeal. Nor is it at all the law of another state, save by coincidence, or that it is in any sense, or by congressional enactment may become, the law of the nation. The court has gone even further and said, that a principle of the common law may, by being embodied in a statute, cease to be common law and state construction of it respected.

No Absolute Recognition of Conclusive Construction by State.—But whatever the reason for the court's exercising independence in construction "of general law" and being subordinate as to "local law," this does not seem to rest on a distinct recognition of supremacy in the state court in the construction of any part of its law.

If, as held by Justice Field, it is "invasion of the authority of the state"[15] for its constituted tribunal not to be allowed to construe conclusively the laws which the state has a

[6] Bank v. Devaux, 5 Cr. 61-87.
[7] Martin v. Hunter, 1 Wheat. 304-347.
[8] Fullerton v. Bank, 1 Pet. 604-614.
[9] Lane v. Vick, 3 How. 464-476; Pease v. Peck, 18 How. 595; Suydam v. Williams, 24 How. 427.
[10] Burgess v. Seligman, *supra*.
[11] Railroad Co. v. Baugh, *supra*.
[12] Beauregard v. New Orleans, *supra*.
[13] Shelby v. Gray, 11 Wheat. 361-367.
[14] Swift v. Tyson, 16 Pet. 1; Carpenter v. Ins. Co., *Id.* 495; Russell v. Howard, 12 How. 139; Watson v. Tarpley 18 *Id.* 517; Railroad Co. v. Lockwood, 17 Wall. 357-368; Hough v. Railroad Co., 100 U. S. 213-226; Myrick v. Mich. Cent. R. R., 107 *Id.* 102-108; Wabash Ry. Co. v. McDaniels, *Id.* 464; Randall v. B. & O. R. R., 109 *Id.* 478; C., M. & St. P. Ry. Co. v. Ross, 112 *Id.* 377; Railroad Co. v. Prentice, 147 *Id.* 101-106; Railroad Co. v. Baugh, 149 *Id.* 368.
[15] *Id.*, in dissent by Field.

right to modify, amend or repeal, he either states a principle that is sound or unsound If it is sound, it is illogical for the federal court to except any law that is applicable to the state's domestic internal affairs. If it is unsound, then when the federal court recognizes state construction as to any part of its law, it does so either as a favor, or on some other principle, either variable or constant in application.

The history of the court shows that it has disregarded state construction as to statutes and even as to a state constitution. In the latter case, it did so, because the construction was quite opposed to the court's sense of justice, for it declared that "we shall never immolate truth, justice or the law, because a state tribunal has erected the altar and decreed the sacrifice."[16] This burst of indignant arraignment was met by the dissent of Justice Miller, who thought the decision was an invasion of state sovereignty and would bring the law into discredit as provoking an unseemly conflict which no tribunal had the power to allay.

Mutual Respect and Deference a Weak Barrier.—The "mutual respect and deference" founded on the presumption, which the court says may be indulged, that the tribunals of the state best know its laws and customs,[17] and on regard for the peace of the community in rules of property cases,[18] seems the only barrier against discordant rulings by two independent jurisdictions in the same territory. Despite this barrier, the federal supreme court has attributed to a state another constitution,[19] and other statutes than its own courts deemed them to be,[20] and has, by its definition of fixed and received construction, made the principle of *stare decisis* as a rule of property of doubtful value in that forum.

Dignity of National Judicial Power.—Where is there room in the expositions of the constitution, that I have instanced, for this independence, as to one class of state law, pure and simple, rather than another, even if state sovereignty is not deemed to be invaded? Or how is it at all derogatory to the dignity of the judicial power of the nation, if that is the theory of independence, that it should be extended to controversies controlled by state law, for the purpose of administering with impartiality the same law, that state tribunals administer? It is no partiality against an alien, or a citizen of another state, to give him the same law the forum gives its own citizens, but on the contrary, the fourteenth amendment says in effect that no state has right to do the otherwise. Is it not derogatory to our government itself to say it empowers its courts to do what it forbids the state courts to do?

Federal Court Can Create No Rule of Law for a State.—It surely could not be successfully urged before a federal court, that a suitor had been denied "the equal protection of the laws," be he alien or citizen of another state, in that his property had been taken from him by a state's wrongful construction of its law, either common or statute, however repeatedly the federal court had differently construed that law. Therefore the federal court can decide no law for any state, can establish no principle of jurisprudence for a state and cannot create a rule of property in any state.

The judgment it renders, if the court is not the state's representative, is but its opinion in a particular case, for state law must remain unaffected by a court not the state's representative. If the court is independent of the state, it is only another way of saying it does not represent the state, and having no participation in its laws, it, of course, can do nothing to affect those laws, except they be challenged for repugnancy to federal law. Possession, therefore, by it of a controversy, may supply a pivot, upon which learned disquisition may turn, but the processes to a conclusion can be valuable to other courts, only as they are convincing or persuade.

A Court Without Moral Attributes.—This mere independence, based not on superiority but on a claim of equality is impotent to attract to the federal court the moral attributes that pertain to the judicial department of a sovereignty, without which the court is poor indeed and when the federal court may, by a course of decisions, create a rule of property or establish a principle of law, it plants a refutation on the very face of its claim of equality. Only a court of conclusive

[16] Gelpcke v. Dubuque, *supra.*
[17] Bell v. Morrison, 1 Pet. 350; Wolf v. Raband, *Id.* 476.
[18] Henderson v. Griffin, 5 Pet. 151-155; Lane v. Vick, *supra*; Foxcroft v. Mallett, 4 How. 353.
[19] Gelpcke v. Dubuque, *supra.*
[20] Pease v. Peck, *supra.*

jurisdiction may do either of these things and such court has no equal and no superior.

Creation of Special Tribunal Supposed.—The proposition that the judicial power of the nation is not extended to these cases for any other reason than the securing of impartiality, would stand in clearer relief, if congress had established special tribunals for their disposition, as it has done in other matters. Then the insignia attributes dignity and independence of the nation's judicial department, would not so much seem to go with the special tribunals, as it may appear to attend the federal courts in what is a sort of incidental function.

More obviously, too, would the question arise, whether the special tribunals were transcending their powers, and the intendment that always goes with a court of general jurisdiction, would be more clearly absent. The very magnitude of the business, its variety, covering, as is said, the whole field of civil jurisprudence, and its vastly increasing importance under commercial conditions, seem to forbid the idea that any jurisdiction taking this cognizance can be or was intended to be a court of any other than general powers. Lastly, and perhaps not least, the name, fame and exalted dignity of the supreme court itself would not be so confusingly thrown upon the canvas in the discussion of this relation. It would be apparent that the question in no way involves the dignity of the federal head of our judicial system, but the only question that could present itself would be, whether the tribunals of limited jurisdiction were keeping within their commission, however vast, intricate or varied were the questions involved, or whatever indirect relation they had to the general interests of the union, or the rights of citizens of sister states.

Creation by State Supposed.—Certain it is, that if the states, instead of supplying a guarantee of impartiality as to aliens and citizens of sister states by extending federal judicial power to their cases, had reserved some control in the constitution of courts, that might be equally presumed to be impartial, their refusal to adopt state construction would be instantly corrected, whether our supreme court were the appellate jurisdiction from their adjudications or not.

Independent Construction not Recognized by Federal Courts.—That independent construction is not satisfactory to the states delegating this power is best attested by the fact, that despite its long assertion, the principle that the courts of another state have the right, authoritatively, to construe its laws, remains unimpaired in the state courts,[21] and I believe search among state reports may be made in vain for any recognition of independent construction in federal courts.

In the very nature of things, the state courts cannot do otherwise, for if they decline to recognize the binding force of other state construction, then they are prepared to descend to a lower level for the alien and the citizen of another state than they must assert toward their own citizens. Thus the law, though settled as to one character of party before them, would be unsettled as to another and the courts of a state would be divided against themselves, a thing infinitely more unseemingly than the conflict I am here considering.

Such Construction Derogatory to States.—Instead, therefore, of subordination to state construction being derogatory to the nation, to me it seems clear that independence by the federal court is in principle, though not in result, as derogatory to the dignity and independence of the state as would be the supremacy of that court. Just as the states, for the purpose of putting a conclusive test upon the righteousness of their legislation, placed in the constitution their detestation of the twin iniquities of *ex post facto* laws and laws impairing the obligation of contracts, so they used similar means to disarm suspicion as to the equal and impartial enforcement of the laws of each.

Does this indicate any intention that any state should the less conclusively for other states and for the nation declare what its laws are, or any expectation that they might mean in any court a different thing to an alien, or the citizen of another state, from what they mean to its own citizen?

[21] Inge v. Murphy, 10 Ala. 885; Hale v. Navigation Co., 15 Conn. 54; Railroad Co. v. Lamar, 68 Ga. 384; Penna Co. v. Fairchild, 69 Ill. 260; Railroad Co. v. Smith, *Id.* 197; McMaster v. Railroad Co., 65 Miss. 264; Pullman v. Lawrence, 74 *Id.* 782; Forepaugh v. Railroad Co., 128 Pa. St. 217, 5 L. R. A. 508; Bridger v. Railroad Co., 27 S. Car. 456.

Ex Post Facto Laws and Laws Impairing Obligation of Contracts.—If so, this is to assert that the states advisedly surrendered some control oftheir internal and domestic affairs for the general interests of the union, just as it is patent they did in respect to *ex post facto* laws and those impairing the obligation of contracts. As to the latter, it may be said that as it cannot be presumed states would ever desire to legislate in the way they are forbidden, then they surrendered nothing, as to which they would desire to exercise power, while the admission of supervision by the government or independence in the expounding of state laws, seems opposed to the principle enunciated by the supreme court, that "the general government and the states are separate and destinct sovereignties acting separately and independently of each other in their respective spheres."[22] It is called the great achievement of the constitution, that it provides such distribution of powers between the nation and the states, as to make them supreme in their respective orbits, the nation supreme as to general concerns and the states supreme in their internal domestic affairs.

If a national court may, as being above, or on equality with, a state court, declare, for any purpose, that to be law of the state, which its own court says is not its law, it does seem plain that the state is not supreme in all respects, in its sphere.

Mere Equality Illogical.—I cannot at all understand the logic of the position, which asserts mere equality of right with the state court, a condition which leaves supremacy neither with the state nor the nation. The nation in its proper function should be supreme, even though it may be admitted, that in some of its legitimate affairs a state acts subordinately to the nation. For example, a state may legislate to affect, incidentally, at least, interstate commerce and the legislation remains valid until congress may differently act as to the same subject.

As the law of the nation is the supreme law of the land, so when its courts say what is that law, they speak supremely and conclusively, and therefore if they do not speak supremely as to the law of the state, it must be because it is a sort of permissive speaking by authority of the nation, but not for the nation.

[22] Collector v. Day, 11 Wall. 113-124.

National Power Not Strictly Involved.—This brings us to the proposition that this feature of the federal judicial power, extended to controversies arising under state law, is not for the benefit of the nation, but merely for suitors as to their rights under state law. *Pro forma*, it is a national affair, but essentially the nation has no more concern in it than if two citizens of a state were litigating their differences in its tribunals. The fourteenth amendment gives the nation an interest in every person's being secured the "equal protection of the laws," but it is no more a violation of that amendment for a state to deny to a citizen of a sister state such protection, than it is to deny it to one of its own citizens.

Fourteenth Amendment.—How this amendment may be enforced unless a federal court administering state law is either above or subordinate to the state tribunal, I confess my inability to discover. If there are two courts, each independently construing the same law, some suitors will be ground, as they have been, between the upper and nether mill stones of discordant decision, and the law that is the shield for one will be a sword against another, and no tribunal may decide which one has been denied "the equal protection of the law." The federal tribunal, which alone would have jurisdiction, could not decide which was the aggrieved party, because it admits that it is within the competency of a state court, as being equal to itself, to arrive at as respectable conclusion as its own, and their views might conflict.

Utility of Federal Independence. — *Cui bono*, then, should this principle of independent construction obtain? It cannot be claimed that it is useful in settling the law, save through a sort of attrition, whereby the spark of truth may finally manifest itself. The supreme court maintains that it would be a dereliction of duty for it not to exercise its independent judgment. So much the more is this true as to the state courts, for they have no other reason for their existence while with the federal courts, its function, as to state law, does not, directly at least, pertain to national sovereignty. Without it the federal court would be left in its integrity as the supreme interpreter of the nation's law, and its dignity cannot be impaired, in that the states, the source of its power, invest

their tribunals with like supremacy as to their laws.

Federal Court Should Be Supreme or Subordinate.—If it is for the general interests of the states that the national courts should independently construe state law, they should be more than independent, but supreme. And if they are supreme, they ought to be open to all the citizens of the nation. An alien or a citizen of a sister state should not have the right to select a court where the law of his case may alone be conclusively decided, if the citizen of the state, whose laws are being construed, have not that right as freely and fully as he.

Just as it is abhorrent that there should be, as to the nation, equal and independent sections of its judicial power, thus also it is as to each state. And as it must be held contrary to all judicial theory, that the court, which may conclusively construe the law of a jurisdiction, should not be open to all whose rights may be affected, so it must be held true that a court open to less than all, should not be permitted to construe conclusively the law of that jurisdiction, but it should be taken to be a court of lesser dignity.

A Twofold Kind of Jurisdiction.—Taking the situation, however, as we find it, and the rulings of the supreme court appear to show, that the judicial power of the nation extends to the subjects enumerated by the constitution in a twofold way. As to those subjects reached because of their nature, this power is supreme, and construction of law in its exercise of jurisdiction is conclusive upon all other courts. As to those subjects within the ordinary jurisdiction of state courts and to which this power extends because of the character of suitors, it is "co-ordinate with, and not subordinate to" the state courts.

From its supremacy as a principle, it is held to be vital to the union's very integrity that it should abate not one jot or tittle. From its co-ordination, that is to say its equality, it may descend by abating its independence, as it has done by adopting state construction, the reasons being satisfactory to itself, and, being followed more or less uniformly, amount or not to what has been called "the habit of the court."

It may not be thought disrespectful either to the supreme court or to one of the great Christian bodies of the world to say that the federal courts define *ex cathedra*, as it were, our national legal faith and what it says in its co-ordinate capacity binds only in an administrative way.

Parties Merely, not the State, Affected.—So viewed, it may be reasoned that this exercise of independence in the construction of state law is not so formidable to state autonomy as it appears. Its exertion begins and ends in the disposal of a question of private right in an exceptional case. The due disposal of causes of its nature in the ordinary jurisdiction, and according to principles there established, is left untouched and unimpaired. A citizen, that the state would have protected in its courts, may have been made to suffer and for this the state must grieve. It may, too, be irritating to a proud sovereignty that the chosen expounders of its laws are not held accredited to the nation, as they are accredited to its people. Nevertheless, the state can pursue the even tenor of its way, conscious of the fact that it has impressed on its judicial department, an attitude no fortuitous jurisdiction can, by a mere claim of equality destroy, and to which it can never rise.

Tendency.—If this position of independence may never become the stepping stone for the federal government to supervise and control in any respect the legislation of a state for other reasons than repugnancy to federal law, the views of the federal court, as to what a state's law is, may never do other harm than to one or the other party to a suit. Some have thought that the view of the supreme court, that it was in duty bound to follow its own judgment in a question "where the nation as a whole, is interested," though in a matter the state may regulate, has a tendency in this direction. If the supreme court should direct and sustain a writ of error to a state court for any such reason, this would be an advance toward the destruction of state autonomy, lengths beyond anything I have discovered in its decisions. Nevertheless, if it would not do this, I cannot understand why it should not unreservedly accord to the judicial department of a state the same kind of supremacy it asserts for itself.

It is said that he governs best, who best governs himself, and if our great tribunal has, from existing in a sort of sublimated atmosphere, conceived to itself, as one of its

members has said, "a fancied duty to enforce contracts over and beyond that appertaining to other courts," may it not be well for our great exemplars of the law's justice to consider, if their eminence may not be better attested in assisting to exalt, before the people, the state tribunals to that dignity the states must desire? If the federal court wrongfully asserts independence of the state court as to any state law, it becomes not a forum, but an arena, where in a solemn masquerade, the worst player is mulcted for the better, and that he pay the cost of the play.

The Remedy.—I have endeavored to show that a state is not independent in its sphere, as is said,[23] if its courts do not, for all other courts, expound conclusively its laws, no federal question being involved, and that two jurisdictions construing the same law independently of each other attracts to the jurisdiction, claiming equality and not supremacy, none of the more dignified attributes of a court of justice. If anything further than here indicated, is needed to show the evils of two independent tribunals construing the same laws in concurrent jurisdiction, look to the elaborate learning employed by one and another suitor to reach or escape the federal courts. If the expositions of the constitution I have instanced show truly the purpose of giving the federal courts cognizance in these cases, it should be treated like a change of venue statute, and congress could regulate its operation. It could be required that no suitor should go into the federal court in the first instance, or take a cause there by removal, unless it be demonstrated in a way that statute prescribes, that, because of local prejudice or partiality, the law might not be administered in the state court as to him with the same impartiality it is administered to others. If the suitor were required specifically to swear that he was not seeking the federal tribunal, because of its differing construction of state law, but only because of local prejudice, who doubts but the ordinary tribunals of cognizance would dispose of the great bulk of the cases, that now seek the casual tribunal as a special privilege. That this matter is within the competency of congressional enactment seems true from the case of Swift v. Tyson, *supra* which has been called an "unfortunate misstep,"[24] down to the case of R. R. Co. v. Baugh, *supra*. In both cases the court expressly admits that congress fixes the limits of federal jurisdiction, and treats the statute as one of strict construction. To me it seems a constitutional jurisdiction, that congress could not add to or impair, but even then, as the constitution's purpose is construed, entrance into the court could be regulated as suggested. If the matter is of entire congressional control the judiciary act of 1798 could be amended to extend the definition of the word "laws." If it cannot be reached by congressional enactment, is not the "anomaly" so serious as to call for constitutional amendment?

NEEDHAM C. COLLIER.

St. Louis, Mo.

[23] *Id.*

[24] Forepaugh v. Railroad Co., *supra*.

CARRIERS—CONTRIBUTORY NEGLIGENCE IN STANDING ON PLATFORM OF TRAIN.

AUGUSTA SOUTHERN R. CO. v. SNIDER.

Supreme Court of Georgia, June 1, 1903.

It is not necessarily, as matter of law, negligence for a passenger to be upon the platform of a moving train. Whether it is negligence or not in a particular case must depend upon the circumstances of danger attending the act, and the reason which the passenger has for so placing himself. Ordinarily, in such cases, the question as to whether such an act is negligence is one for a jury; and unless the danger is obviously great, as where the train is moving at a rapid rate of speed, or the condition of the passenger is such as to make his presence upon the platform manifestly dangerous while the train is moving at any rate of speed, the court cannot hold, as matter of law, that the passenger's presence upon the platform is such negligence as would preclude a recovery for injuries received by being thrown from the platform by a sudden jerk of the train.

COBB, J.: This comes before us upon assignments of error complaining that the court erred in overruling a general demurrer to the plaintiff's petition, and in refusing to grant a new trial, the motion therefor being based solely upon the grounds that the verdict is contrary to law and the evidence. As the evidence authorized a finding that the material averments in the petition had been established, if such evidence was sufficient in law to authorize a recovery, of course there was no error either in refusing a new trial or in overruling the demurrer. There was a conflict in the evidence as to some of the material questions. Viewing the evidence most favorably for the plaintiff, the case presented is as follows: Plaintiff was a passenger upon a mixed train of the defendant. He was in his seat when the conductor announced the name of the station which was his destination. Seeing the conductor ap-

proach a lady passenger to help her to alight from the train, he arose from his seat while the train was in motion, and proceeded to the rear door of the car. He stepped upon the rear platform while the train was moving at the rate of about four miles an hour. Seeing that the train was going to pass the usual stopping place and that the speed was not decreasing, he turned to make his way back into the car, and, just as he turned, a sudden jerk of the train made him lose his balance, and in consequence he was thrown to the ground and received injuries resulting in a strangulated hernia. The jerk was sudden, violent, and unusual. The question is whether the plaintiff was guilty of such negligence as would defeat a recovery.

It cannot be held, as matter of law, that it is negligence on the part of a passenger to leave his seat while the train is in motion, and we do not understand that this is insisted on in this case. Neither can it be held, as matter of law, that it is negligence for a passenger to go upon the platform of a car propelled by steam, while it is in motion. Macon & Western Railroad Co. v. Johnson, 38 Ga. 437 (7). Whether going upon the platform while the train is in motion is such negligence as to defeat a recovery by one who is injured, depends upon the speed of the train, the age and physical condition of the party, and other circumstances. Where the train is moving at a rapid rate of speed, it would be negligence in a passenger to go unnecessarily upon the platform; and, even where the train is not moving rapidly, it would be negligence *per se* for an infirm or enfeebled passenger to go unnecessarily upon the platform. In a case where there is nothing in the condition of the passenger to make his presence upon the platform a negligent act in itself, and where the speed of the train is not such that it would be necessarily dangerous for any one to be upon the platform, it would be a question for determination by the jury whether the presence of the passenger upon the platform was such an act of negligence on his part as would preclude a recovery by him for an injury resulting in part from his presence there. For a passenger to be unnecessarily upon the platform of a train, either standing still or in motion, might be such a negligent act on his part as would authorize the jury to reduce the damages to which he would have been entitled if he had been free from negligence. See Macon R. Co. v. Johnson, *supra*. But whether his presence upon the platform is such a negligent act as would entirely defeat his recovery, depends upon the circumstances above referred to, or others of a similar nature. See, in this connection, 5 Am. & Eng. Enc. L. (2d Ed.) 681, 682. The rule in such cases is similar to that which would be operative where one alights from a moving train. In Suber v. Railway Co., 96 Ga. 42, 23 S. E. Rep. 387, Mr. Chief Justice Simmons says: "It is not necessarily, as matter of law, negligent for a person to leave a moving train. Whether it is negligent or not in a particular case must depend upon the circumstances of danger attending the act, and the special justification which the person leaving the train had for doing so. Ordinarily, in cases of this kind, the question of what is or is not negligence is one for the jury; and unless the danger is obviously great, as where the train is moving at full speed, the court cannot hold that leaving the train is, as matter of law, such negligence as should preclude a recovery." The Suber case has been approved and followed in Macon Railroad Co. v. Moore, 108 Ga. 90, 33 S. E. Rep. 889; Coursey v. Railway Co., 113 Ga. 299, 38 S. E. Rep. 866; Travelers' Protective Ass'n v. Small, 115 Ga. 457, 41 S. E. Rep. 628. The cases relied on by counsel for plaintiff in error are, we think, distinguishable from the present case. In Blitch v. Central Railroad, 76 Ga. 333, it was in the night and the train was moving rapidly. In Patterson v. Railroad Co., 85 Ga. 653, 11 S. E. Rep. 872, it was in the night, and the plaintiff had not only gone upon the platform, but was standing on the steps preparing to get off at a street crossing which was not a regular stopping place. In addition to this, the Patterson case must be permitted to rest upon its own peculiar facts. It has not only never been followed, but has never been cited as authority in any subsequent case.

Judgment affirmed by five Justices.

NOTE.—*Contributory Negligence of Passenger in Riding on Platform of Moving Train.*—It is a well settled rule of law that it is not contributory negligence for a passenger on a street car to remain on the platform of a moving train or street car, when there is no room inside. Marion, etc., R. R. v. Shaffer, 9 Ind. App. 486, 36 N. E. Rep. 861; Highland Ave. R. R. Co. v. Donovan, 94 Ala. 299; Metropolitan R.R.v. Snashall, 3 App. (D. C.) 420; Chicago, etc., R. R. v. Fisher, 141 Ill. 614, 31 N. E. Rep. 406; Upham v. Railroad, 85 Mich. 12, 48 N. W. Rep. 199; Chicago, etc., R. R. v. Dumser, 161 Ill. 100, 43 N. E. Rep. 698; Pray v. Railroad, 44 Neb. 167, 62 N. W. Rep. 447, 48 Am. St. Rep. 717; Werle v. Railroad, 98 N. Y. 650. In states like New York which have a statute providing that a railroad company shall not be liable to passengers injured while on the platform, if at the time furnished proper accommodations within the car, the term "proper accommodations" would most probably and properly be considered as meaning seats, not standing room. Willis v. Railroad, 32 Barb. 398, affirmed in 34 N. Y. 670. *Contra:* Andrews v. Railroad, 2 Mackey (D. C.), 137, 47 Am. Rep. 266; Worthington v. Railroad, 64 Vt. 107, 15 L. R. A. 326. A passenger would not be guilty of contributory negligence in riding on platform if there were no seats inside. But the difficulty in this class of cases is that the injured party does not always know whether there are seats for him or not. Is it his duty to find out? In New York it is held that if the train or car is not in motion it is the passenger's duty to look through the train or car for seats. Otherwise, if the car is in motion. Willis v. Railroad, *supra*. In Illinois the court had occasion to consider the question whether after a large number of passengers had left the car a passenger was obliged to see if there were any vacant seats for him. The court said that that question was for the jury. Chicago, etc., R.R. v. Fisher, 141 Ill. 614, 31 N. E. Rep. 406. But a passenger may get on a crowded car without invitation

either express or implied from the conductor. In such case it has been held that if the car is so full that the passenger could not stay on without holding to the railing with both hands he was negligent. Tregeur v. Dry Dock R. R., 14 Abb. Prac. (N. Y.) 49. But otherwise where the conductor impliedly or expressly permitted him to remain on the steps.

Where there is room inside the car, the authorities are divided as to whether it is negligence in the passenger to remain on the platform. The preponderance of authority holds that it is negligent *per se* for a passenger to remain on the platform of a *moving train* when there is room inside. Memphis, etc., R.R. v. Solinger, 46 Ark. 528; Chicago, etc., R. R. v. Rielly, 40 Ill. App. 416; Goodwin v. Railroad, 84 Me. 203; Hickey v. Railroad, 96 Mass. 429; Smotherman v. Railroad, 29 Mo. App. 265; Aikin v. Railroad, 142 Pa. St. 47, 21 Atl. Rep. 781; Worthington v. Railroad, 64 Vt. 107, 15 L. R. A. 326. *Contra:* Bonner v. Glenn, 79 Tex. 531, 15 S. W. Rep. 572; International, etc., R. R. v. Welsh (Tex.), 24 S. W. Rep. 854. On the other hand the preponderance of authority seems to hold that standing on the platform of a moving *street car*, even when there is room inside, is not, under ordinary circumstances, negligence *per se*, at least in the absence of any published rule of the carrier forbidding it. Augusta, etc., R. R. v. Renz, 55 Ga. 126; Sutherland v. Insurance Co., 87 Iowa, 505, 54 N. W. Rep. 453; Meesel v. Railroad, 90 Mass. 234; Upham v. Railroad, 85 Mich. 12, 48 N. W. Rep. 199, 12 L. R. A. 129; Matz v. Railway Co., 52 Minn. 159, 53 N. W. Rep. 1071; Beal v. Railway Co., 157 Mass. 444, 32 N. E. Rep. 653; Muldoon v. City Railway Co., 7 Wash. 528, 35 Pac. Rep. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794. In Alabama, however, it was held that in an action for injuries received by a passenger who was thrown from a moving car by a sudden jerk, the passenger cannot recover if he was standing on the platform when there was room for him to sit or stand in the car, and the negligence of the motorman would not have caused the injury, if the passenger had been inside. McDonald v. Montgomery, 110 Ala. 161, 20 So. Rep. 317. So also in Bradley v. Railway Co., 90 Hun (N. Y.), 419. In Missouri it is difficult to tell just where the courts stand. The supreme court held in the case of Burns v. Railway Co., 50 Mo. 139, that, as a matter of law, the fact that a street railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, will not absolve the company from liability for injuries there received by him. The court of appeals, however, held in the case of Ashbrook v. Frederick Ave. Ry. Co., 18 Mo. App. 290, that a man standing on the front step of a horse car, bowing to his wife inside was guilty of contributory negligence. An interesting case illustrating how stringent is the rule relating to steam railroads is the case of Worthington v. Central Vermont Railway Co., 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326. In this case it was held that where a passenger on defendant's excursion train secures a seat for himself, but afterwards resigns it to a lady, and, after remaining in the aisle of the car for a time, goes out on the platform, intending to enter another car, but, finding that full, remains on the platform, from which he is thrown off, he is guilty of contributory negligence, since he was not compelled to stand on the platform.

The rule, however, which relieves railroad companies from liability for injuries received by passengers when on the platform of a car does not apply to passengers on a street car who, at the invitation of the conductor orother employee of the road, go onthe platform for the purpos of alighting, or for any other purpose remains there. Baltimore, etc., R. R. v. Meyers, 62 Fed. Rep. 367; Kentucky, etc., Bridge Co. v. Quinkert, 2 Ind. App. 244, 28 N. E. Rep. 338; Olivier v. L. & N. Railroad, 43 La. Ann. 804, 9 So. Rep. 431; Buck v. Power Co., 46 Mo. App. 555; Clark v. Railway Co., 36 N. Y. 135; Guma v. Railway Co., 67 N. Y. 596; West Philadelphia Ry. Co. v. Gallagher, 108 Pa. St. 524. In Michigan it has been held that a passenger who rides on the rail of the front platform of a street car, though at the driver's invitation, is guilty of contributory negligence. Downey v. Hendrie, 46 Mich. 498, 9 N. W. Rep. 828, 41 Am. Rep. 177. In Missouri it was held, on the other hand, that it was not negligence *per se* for a passenger on a street car to stand on the step of the car, outside of a gate placed between the step and the platform, at the express or implied consent of the driver; the danger not being so obvious that it can be said that a reasonable man would disobey the invitation. Seymour v. Citizens' Ry. Co., 114 Mo. 266. This we believe to be the proper rule. See 45 Cent. L. J. 270; 52 Cent. L. J. 223.

JETSAM AND FLOTSAM.

THE GRADUAL REDEMPTION OF IMPERFECT RIGHTS BY EXTENSION OF THE JURISDICTION OF COURTS, HAVING SPECIAL REFERENCE TO THE COURT OF CLAIMS.

Most lawyers fail to reach the highest eminences in their profession because of their lack of acquaintanceship with the great foundation principles of jurisprudence. Such lawyers, however, while admitting their neglect in this regard, justify themselves with the excuse that the acquirement of such knowledge has no immediate or practical value. Even if this contention were true, it would not excuse ignorance of the science and history of the principles of his calling on the part of a member of a profession noted for its deep learning and versatile acquirements. But it is not true. That a knowledge of the great principles of jurisprudence is not only an artistic and liberal acquirement for the lawyer, but one, also, of great practical value, is well illustrated by the celebrated argument of that great advocate, Charles O'Conor, in the case of the brig-of-war General Armstrong, in the United States Court of Claims in 1855.

This was an action on a claim against the United States government for negligence in failing to secure indemnity from the nation of Portugal for injuries done to a certain American vessel while in the ports of the latter country. The absence of precedents was urged by the government solicitor against the prosecution of this claim, and the complainants were called upon to produce from the books of the common-law, some instance of an action brought, a trial had, and a judgment rendered for the plaintiff upon a similar claim. Mr. O'Conor denounced such a demand as "unreasonable" since the court itself was "the first born of a new judicial era," and, consequently, every case coming within its new and heretofore unheard of jurisdiction must, in the nature of things, be "extraordinary" and dependent upon principles not hitherto falling within the judicial authority.

Not content, however, with this simple and apparently effective rebuke, Mr. O'Conor, with that remarkable knowledge and keen perception of legal principles for which he was celebrated, essayed to supply the lack of exact precedents by an apt reference to the origin and growth of jurisprudence in

certain particular instances most analogous to the case before him. We know of no clearer or more perfect statement of the distinction between perfect and imperfect rights, and of the gradual enlargement of the circle of perfect rights by the provision from time to time, either by the legislation or by the courts themselves, of new instrumentalities for enforcing rights and duties which had hitherto been considered imperfect, than that contained in Mr. O'Conor's argument. Mr. O'Conor said:

"Rights and their correlative duties are divided into two classes; that is to say, the perfect and the imperfect. The only difference between these classes is in external circumstances; intrinsically or morally there is none. Perfect rights are those which may be enforced by established remedies; perfect duties are those the performance of which may be coerced; a right of imperfect obligation is one for the enforcement of which no remedy is provided. Jurisprudence as administered by human tribunals, deals only with the means of enforcing rights which are recognized as perfect, but, like all moral sciences, it is capable of improvement. As the general mind of a nation advances in that freedom which is the result of increased knowledge, the legislative authority will constantly enlarge the sphere of action assigned to jurisprudence, and increase its power of establishing justice. Jurisprudence is only the means; justice is the end. Jurisprudence is of human origin; justice is an attribute of divinity, pre-existant of all created things, external and immutable. Its authority is not derived from any human code, either of positive institution or of customary reception; its decrees are found in the voice of God speaking to the heart which faith has purified to receive, and reason enlightened with capacity to understand. When thus aided by the legislature, jurisprudence is enabled to enlarge the circle of perfect rights by furnishing, from time to time, new instrumentalities for enforcing justice. *Est boni judicis ampliare jurisdictionem* is a sound and unexceptionable maxim; for the exercise of jurisdiction is but giving to men in a practical form the behests of divine justice, and enforcing their observance. This is well illustrated by the rise and progress of the English law. In the lofty growth of equity, by the side of its stunted rival, the common law, we see by what means rights founded in justice and conscience, but not yet recognized by positive law, may rise in grade, acquire recognition, and become enforceable by adequate remedies. In that example this court will find the best lights for its government. In our early law books we find it urged and admitted that 'every right must have a remedy.' But Lord Chief Justice Vaughan stripped this commonplace of all its force by replying: 'Where there is no remedy, there can be no right.' The common law judges of England always acted upon the principle embodied in this remark. From their rigid adherence to it arose the necessity of a distinct jurisdiction,—the power of equity to compel an observance of those duties which conscience enjoined, but which positive law had provided no means of enforcing.

The ordinary courts of law are not created to declare or enforce justice in the abstract, or justice in general. Their function is to effectuate such human rights only as, in the existing stage of its progress, jurisprudence is enabled to bring within the sphere of its remedial forms, leaving all others to be sought by entreaty, and yielded by free will. The judge is obliged to dismiss every claim, however just, for enforcing which he cannot find an appropriate writ in the register; and, consequently, the regret of the bench and a deep censure upon the defendant is often expressed in the same breath with a judgment denying the remedy sought. This was strikingly exemplified in the case of Bartholomew v. Jackson, 20 Johns. (N.Y.) 28. An honest farmer, seeing his neighbor's wheat stack on the verge of being consumed by fire in the owner's absence, voluntarily assumed the task of saving it, and did so at a slight cost. Reimbursement being churlishly refused, he brought an action in a justice's court, and the rustic magistrate, not learned enough to know that legal policy sometimes stifles the voice of conscience, decided in favor of the plaintiff. The defendant appealed; and when reversing the decision on the ground that for a service, however beneficial, rendered without a previous request, no action lay, the supreme court of New York denounced the defendant's conduct as 'most unworthy.' In this censure all honest men must concur. No one could doubt that, had the owner of the wheat been present at the moment of peril, he would have requested aid and promised compensation. An honest man would have conceded this, ratified his neighbor's kind intervention, and promptly repaid his expenditure; but selfishness saw that this was a duty of imperfect obligation, and a callous conscience dishonorably refused to perform it.

The equity jurisdiction of Great Britain has been considered as an anomaly in legal science. Continental jurists seem never to have comprehended it, though it could easily be shown that no civil society ever existed in which there was not some remediable forms of injustice which *lex non exacte definit sed arbitrio boni veri permittit.* Institutions which are novel in form will always excite criticism and opposition, however harmonious they may be, in principle, with what has gone before. But the difficulties which may beset the path of this court at the outset of its high career cannot be greater than those which surrounded the early English chancellors in their efforts to mitigate the rigor and supply the imperfections of positive law. They had no judicial precedents to guide them in stilling the waves of contention; the great unwritten law of natural justice alone governed. They claimed to deal with matters binding in conscience only, and the power to enforce its dictates. At every step they had to contend with the argument now urged against us, that there was no legal remedy, and consequently the law left it optional with the defendant now to demean himself in the premises. As in the present case, the law—the law was dinned into the ears of the court by the advocates of wrong, with loudness and pertinacity; but the clamor was unavailing. Without aid from precedents, but guided by principles, the courts grappled with and mastered the devices of iniquity. Justice! Equity! Conscience! Words without definition, and incapable of being defined, alone prescribed their jurisdiction, and neither legal nor political science had any further connection with the new cases arising before them than to aid in solving the question how far state policy would admit of right being done to the injured suitor. To the precise extent which a due regard to public policy would admit, the masters of equity encroached upon the territory of imperfect duties, making firm land wheresoever they trod. Thus they gradually redeemed from the outlawry to which ignorance or inexpertness had consigned them a large class of imperfect rights, and enforced a large class of duties before deemed imperfect—because not enforceable—but which were always obligatory in the eyes of God,

and were always voluntarily performed by honest men.

Prior to the institution of this court [the court of claims], all rights, as against the nation, were 'imperfect;' every duty of the nation was a duty of imperfect obligation. There was no judicial power capable of declaring either. No private person possessed the means of enforcing the one or coercing the other. These rights may be deemed still to remain, in one sense, imperfect for the decree of this court cannot be carried into execution by authority of the court itself. But effectual progress has been made toward giving form and method to the administration of justice between the nation and the individual. This court enables the latter to obtain an authoritative recognition of his right. No more is needed; for in no case can a state, after such a recognition, withhold payment, and yet retain its place in the great family of civilized nations. Caprice can no longer control. Here equity, morality, honor, and good conscience must be practically applied to the determination of claims, and the actual authority of these principles over governmental action ascertained, declared and illustrated in permanent and abiding forms. As, step by step, in successive decisions, you shall have ascertained the duties of government towards the citizen, fixed their precise limits upon sound principles, and armed the claimant with means of securing their enforcement, a code will grow up, giving effect to many rights not heretofore practically acknowledged. In it will be found enshrined, for the admiration of succeeding ages, an honorable portraiture of our national morality, and a full vindication of the eulogium recently pronounced upon our people by the highest authority in the parent state. 'Jurisprudence,' says Lord Campbell, in Reg. v. Millis, 'is the department of human knowledge to which our brethren in the United States of America have chiefly devoted themselves, and in which they have chiefly excelled.'"

BOOKS RECEIVED.

Legal Masterpieces. Specimens of Argumentation and Exposition by Eminent Lawyers. Edited by Van Vechten Veeder. In two volumes. St. Paul, Minn. Keefe-Davidson Company, 1903. Cloth, pp. 1350. Price, $6. Review will follow.

HUMOR OF THE LAW.

James R. Mack, the attorney, tells this reminiscence of his law practice in Ohio:

"One Sam Johnson, a negro, was indicted in Cincinnati, charged with the theft of a ham. Johnson was stiff-necked, for the only witness against him was a man of his own color, and 'one nigger's word is as good as 'nuther's,' said Sam. 'He'll swar I did, an' I'll swar I didn't.' The case came up for trial, and the indictment was read: 'The State of Ohio against Samuel Johnson, defendant,' etc. As he listened, Johnson turned gray, and at the demand of a plea, rose to his feet, ignoring the counsel assigned to him.

'Youah honah,'" said Johnson, 'I'se not been treated right, nohow. I t'ought dar wuz only one nigger 'gainst me, an' heah's de whole state ob Ohio. I wuz not 'feared ob that nigger what seen me hook de ham, but I'se got no show now. De whole blame state 'gainst me's too much. Yessir, I took de ham. I pleads guilty. But I'd like ter know whar all de watchers wuz hidin', I suttinly would.'"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE — Cause of Death. — Death from rupture from an accidental fall held the result of the accident, "independent of all other causes," notwithstanding a cancerous condition made the rupture possible.—Fetter v. Fidelity & Casualty Co. of New York, Mo., 73 S. W. Rep. 592.

2. ACCOUNT—Petition. — Complainant in a proceeding for an accounting must set forth facts showing that something will be found due to him by the defendant.—Gould v. Barrow, Ga., 43 S. E. Rep. 702.

3. ACTION—Stay.—Another action on the same subject-matter in another court will not be stayed, where party can obtain in such court greater relief. — Nussberger v. Wasserman, 81 N. Y. Supp. 295.

4. ADJOINING LANDOWNERS—Party Walls.—A landlord held not a necessary party to a suit by his tenant to restrain the continuance of an obstruction to access by means of a party wall. — Winsor v. German Savings & Loan Soc., Wash., 72 Pac. Rep. 66.

5. ADULTERY — Evidence. — On trial under an indictment for adultery, evidence of occurrences about four years before the indictment was found is not inadmissible.—United States v. Griego, N. M., 72 Pac. Rep. 20.

6. ADVERSE POSSESSION — Ejectment. — In ejectment, a sheriff's deed to plaintiff's grantor is of itself no evidence of adverse possession by plaintiff's grantor.—Prevatt v. Harrelson, N. Car., 43 S. E. Rep. 800.

7. ADVERSE POSSESSION — Limitation. — One's title by deed being devested out of him by possession of another before he went into possession, he can claim only by limitation of 10 years.—Smith v. Bunch, Tex., 73 S. W. Rep. 559.

8. ADVERSE POSSESSION — Prescription as Against State. — The plea of prescription is not valid as against land belonging to the state. — Slattery v. Heilperin, & Leonard, La., 34 So. Rep. 139.

9. ANIMALS — Lease of Sheep. — Under a contract for the lease of sheep, lessee was not authorized to sell the herd.—Turnbow v. Beckstead, Utah, 71 Pac. Rep. 1062.

10. ANIMALS — Ordinary Care.—What constitutes ordinary diligence for the safety of live stock in the care of an agister held a question for the jury.—Arrington Bros. & Co. v. Fleming, Ga., 43 S. E. Rep. 691.

11. APPEAL AND ERROR—Constitutional Question.—On a second appeal, a substituted defendant cannot raise constitutional questions which on the first appeal the court held its predecessor could not raise.—Great Plains Water Co. v. Lamar Canal Co., Colo., 71 Pac. Rep. 1119.

12. APPEAL AND ERROR—Dismissal of Writ.—The ordinary delays of mail are not providential cause, authorizing the reinstatement of a writ of error dismissed for want of prosecution. — Griffith v. Mitchell, Ga., 43 S. E. Rep. 742.

13. APPEAL AND ERROR — Filing Briefs.—Where appellants' failure to file their briefs in the trial court in time deprived appellees of their right to 20 days to file their briefs before submission, the appeal will be dismissed.—Harris v. Bryson & Hartgrove, Tex., 73 S. W. Rep. 548.

14. APPEAL AND ERROR — New Trial. — The supreme court will not interfere with the first grant of a new trial, where no abuse of discretion is shown. — Peed v. Hamilton, Ga., 43 S. E. Rep. 702.

15. APPEAL AND ERROR — New Trial. — The supreme court has no power to grant new trials because of excessive damages. — Weber v. Southern Ry. Co., S. Car., 43 S. E. Rep. 888.

16. APPEAL AND ERROR—Substitution of Parties.—Application for substitution of new party should be first made in trial court, even after an appeal. — Fay v. Steubenrauch, Cal., 72 Pac. Rep. 156.

17. APPEAL AND ERROR — Sufficiency of Evidence.—The sufficiency of the evidence to sustain a verdict will not be considered upon a direct bill of exceptions.—Bacon & Sons v. Jones, Ga., 43 S. E. Rep. 689.

18. APPEAL AND ERROR — Transcript. — The fact that appellants caused the transcript of the record to be at once forwarded to the supreme court held not ground for dismissing the appeal. — Chapin v. City of Port Angeles, Wash., 72 Pac. Rep. 117.

19. ARBITRATION AND AWARD — Acceptance of Award. —One who accepts an award cannot contend that the submission was not to arbitration, but to appraisement. —Downing v. Lee, Mo., 73 S. W. Rep. 721.

20. ARBITRATION AND AWARD — Party Wall. — Where an owner willfully violated a contract for the joint use of a party wall, he was estopped to object that plaintiff could not sue to enjoin such obstruction until after arbitration, as provided by the contract for the use of the hall. — Winsor v. German Savings & Loan Soc., Wash., 72 Pac. Rep. 66.

21. ASSAULT AND BATTERY—Evidence.—On trial for an assault, it is not error to exclude evidence of insulting words used to the daughter of the accused on the evening prior to the assault. — Walker v. State, Ga., 43 S. E. Rep. 737.

22. ATTACHMENT — Dismissal.—Though an attachment be absolutely void, it is no ground for dismissing the declaration, which has been filed, where defendant has been duly cited. — McAndrew v. Irish-American Bank, Ga., 43 S. E. Rep. 858.

23. ATTORNEY AND CLIENT—Disbarment.—An attorney disbarred for retaining money collected for his client, concealing the collection, and unfair treatment of his client.—People v. Webster, Colo., 71 Pac. Rep. 1116.

24. BANKRUPTCY—Creditor's Claim.—Action on creditor's claim held not barred by discharge in bankruptcy, where the debt had been scheduled in the name of the original payee, with knowledge of the transfer thereof.—Columbia Bank v. Birkett, N. Y., 66 N. E. Rep. 652.

25. BANKRUPTCY — Discharge.—A contract for the sale of goods held not to retain title in the seller to such goods or their proceeds, or create a fiduciary relation between the parties, so that the debt of the purchaser for the proceeds of goods sold and not paid for would not be released by his discharge in bankruptcy. — *In re* Butts, U. S. D. C., N. D. N. Y., 120 Fed. Rep. 966.

26. BANKRUPTCY—Discharge.—So-called specifications of objection to the discharge of a bankrupt, which merely state the grounds for refusing a discharge in the language of the statute, without any attempt to specify any particular act of the bankrupt, are wholly insufficient, and no evidence can be received thereunder, nor do they afford any basis for amendment. — *In re* Peck, U. S. D. C., D. Conn., 120 Fed. Rep. 972.

27. BANKRUPTCY—Discretion of Court.—The reduction of an allowance of $1,000 to attorneys for creditors in involuntary bankruptcy proceedings to $196.68 held not a proper exercise of the court's discretion. — Smith v. Cooper, U. S. C. C. of App., Fifth Circuit, 120 Fed. Rep. 230.

28. BANKRUPTCY — Exemptions. — Bankr. Act, § 6, Act July 1, 1898, 30 St. 548, U. S. Comp. St. 1901, p. 3424, held not to enlarge exemptions allowable under state laws, nor prevent the enforcement of Code Iowa, § 4015, prohibiting the allowance of exemptions on executions for purchase money.—*In re* Boyd, U. S. D. C., N. D. Iowa, 120 Fed. Rep. 999.

29. BANKRUPTCY — Goods Fraudulently Obtained. — Where a claimant against a bankrupt for goods fraudulently obtained filed a claim based on the contract, he could not recover other goods similarly sold remaining in the bankrupt's possession.—*In re* Hildebrant, U. S. D. C., N. D. N. Y., 120 Fed. Rep. 992.

30. BANKRUPTCY — Library Corporation. — A library corporation, not engaged in publishing or any mercantile pursuit, held not within Bankr. Act, § 4b, U. S. Comp. St. 1901, p. 3423, and it cannot, therefore, be adjudged an involuntary bankrupt. — *In re* Parmelee Library, U. S. C. C. of App., Seventh Circuit, 120 Fed. Rep. 235.

31. BANKRUPTCY — Preference.—Property transferred as security for a just debt is not to be excluded from consideration, in determining the debtor's solvency, in involuntary proceedings against him in bankruptcy, under Bankr. Act, § 1, subd. 15, U. S. Comp. St. 1901, p. 3419, merely because the transfer may constitute a preference. — *In re* Doscher, U. S. D. C., E. D. N. Y., 120 Fed. Rep. 408.

32. BANKRUPTCY — Replevin. — Under the bankruptcy act of 1898, property in possession of trustee cannot be reached by replevin issuing out of a state court.—Mishawaka Woolen Mfg. Co. v. Powell, Mo., 72 S. W. Rep. 723.

33. BANKRUPTCY—Spendthrift Trust.—As precedent to obtaining discharge, held necessary for bankrupt to assign his interest in spendthrift trust to trustee in bankruptcy. — *In re* Fleishman, U. S. D. C., N. D. Ill., 120 Fed. Rep. 960.

34. BANKRUPTCY — Subrogation. — A trustee in bankruptcy will not be subrogated by the court to the rights of an attaching creditor to enable him to defeat a lien of one who has the superior equity. — *In re* Sentenne & Green Co., U. S. D. C., E. D. N. Y., 120 Fed. Rep. 486.

35. BANKRUPTCY — Suit in Equity. — The district court held without jurisdiction of a suit in equity by a trustee in bankruptcy against a non-resident creditor, which did not consent nor appear. — Havens & Geddes Co. v. Pierek, U. S. C. C. of App., Seventh Circuit, 120 Fed. Rep. 244.

36. BANKS AND BANKING—Garnishment. — Relation of debtor and creditor between a principal and garnishee held established by deposit of funds by the principal with garnishees for use of an agent. — Curtis v. Parker & Co., Ala., 33 So. Rep. 935.

37. BANKS AND BANKING — Payment to Agent.—A bank held not liable to account to the owner of a fund deposited by an agent in his own name and paid out on his own check. — Martin v. Kansas Nat. Bank, Kan., 72 Pac. Rep. 218.

38. BANKS AND BANKING—Preferred Creditor.—Fiancee of cashier of insolvent bank, furnishing securities for loan to it through inducement of cashier, held entitled to recover from receiver as preferred creditor.—Hallett v. Fish, U. S. C. C., D. Ver., 120 Fed. Rep. 986.

39. BENEFIT SOCIETIES—Beneficiary.—Change of beneficiary of mutual benefit certificate held effected, though member was unable to return original certificate, as required by the by-laws or the constitution.—Lahey v. Lahey, N. Y., 66 N. E. Rep. 670.

40. BILLS AND NOTES—Demand Note.—A note payable on demand held not overdue when transferred 18 months after date, interest having been paid monthly on it to

and after the transfer.—McLean v. Bryer, R. I., 54 Atl. Rep. 378.

41. BILLS AND NOTES—Evidence of Title.—In an action on a note by an indorsee, the possession of the note by plaintiff, with an indorsement by one whose name is identical with that of the payee, is prima facie evidence of title.—Gumaer v. Sowers, Colo., 71 Pac. Rep. 1108.

42. BROKERS—Right to Sell.—Broker, having bought stocks on margin, cannot sell them out unless the customer waives tender, demand of payment, and notice of sale.—Tuell v. Paine, 80 N. Y. Supp. 956.

43. BUILDING AND LOAN ASSOCIATION — Mistake. — A statement, sent by a building and loan association to a stockholder by mistake, that this loan was paid in full, will not bind the association, where it was at once recalled and on rights intervened.—Alexander v. Southern Home Building & Loan Association, U. S. C.C., D. S. Car., 120 Fed. Rep. 963.

44. BUILDING AND LOAN ASSOCIATION—Usury.—A borrower of a building association cannot be deprived of his rights, on account of usury by a subsequently passed by law, though he contracts to be bound by such by-law.—Georgia State Building & Loan Association v. Grant, Miss., 34 So. Rep. 84.

45. CANCELLATION OF INSTRUMENTS — Right to Damages.—Where the complainant sought the cancellation of a deed only, and did not ask for any legal relief, he was not entitled to a judgment for damages, even though the facts showed him to be entitled thereto.—Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co., Colo., 71 Pac. Rep. 1121.

46. CARRIERS—Contributory Negligence. — A woman, attempting to alight from a train in the night time, with a parcel in her hand, while the car is in motion, takes the risk thereof.—McMichael v. Illinois Cent. R. Co., La., 34 So. Rep. 110.

47. CARRIERS—Crossing Railroad Tracks. — Where the position of the station and the tracks is such that intending passenger must cross intervening tracks to reach his train, it is a question for the jury whether he exercised proper care in so doing.—Redhing v. Central Ry. Co., N. J., 54 Atl. Rep. 431.

48. CARRIERS—Hackmen at Station.—A railroad company is under no duty as a common carrier to permit hackmen to enter its stations for the purpose of soliciting business from its passengers, and therefore its granting of such right to one person or concern does not entitle others to equal privileges on the same terms.—Donovan v. Pennsylvania Co., U. S. C. C. of App., Seventh Circuit, 120 Fed. Rep. 215.

49. CARRIERS—Intoxicated Passenger.—Railroad company held not liable for injury to intoxicated passenger by another train, after arrival at destination.—Nash v. Southern Ry. Co., Ala., 33 So. Rep. 932.

50. CARRIERS—Limiting Liability.—Acceptance by one from railroad of tickets bearing provision exempting railroad from liability for injuries held not to render such provision binding on the acceptor of the tickets.—Dow v. Syracuse, L. & B. Ry., 80 N. Y. Supp. 941.

51. CARRIERS—Ordinary Jerks.—The ordinary jerking of a train in starting and taking up the slack held not negligence as to a person alighting from the train while in slow motion.—Saxton v. Missouri Pac. Ry. Co., Mo., 72 S. W. Rep. 717.

52. CENSUS—City's Right to Take.—A city held authorized to take a census for determining population, and so the limit of indebtedness, though a federal census had been taken two months before. — Lancaster v. City of Owensboro, Ky., 72 S. W. Rep. 781.

53. CHATTEL MORTGAGES—Absence of Seal.—A chattel mortgage, otherwise properly executed, is not insufficient, by reason of a scroll or seal.—Burkamp v. Healey, Ky., 72 S. W. Rep. 759.

54. CHATTEL MORTGAGES—After Acquired Property.—A chattel mortgage of a mechanical plant, covering additions made to maintain or improve its condition and efficiency, which is valid against the mortgagor, will be enforced as to additions made to the plant for that purpose by a purchaser from the mortgagor, who assumed all his obligations under the mortgage.—*In re* Sentenne & Green Co., U. S. D. C., E. D. N. Y., 120 Fed. Rep. 436.

55. CONSTITUTIONAL LAW—Due Process of Law.—Act Feb. 28, 1899, Weekly Wage Law, Laws 1899, p. 198, ch. 124, held unconstitutional, as infringing the right of private contract and depriving persons affected thereby of right of property without due process of law.—Republic Iron & Steel Co. v. State, Ind., 66 N. E. Rep. 1005.

56. CONSTITUTIONAL LAW — Ejectment. — The statute permitting an occupant of land, who has been ejected, to recover for improvements made in good faith, held not in violation of Const. art. 2, § 20.—Tice v. Fleming, Mo., 72 S. W. Rep. 689.

57. CONSTITUTIONAL LAW—Gas Meters.—The transportation corporation act, Laws 1890, ch. 566, providing that a gas company shall not charge, either directly or indirectly, any rental for its meters, is not unconstitutional, as confiscating property without due process of law.—City of Buffalo v. Buffalo Gas Co., 80 N. Y. Supp. 1093.

58. CONSTITUTIONAL LAW — Municipal Corporations.—Code 1892, § 3039, as amended by Act March 12, 1900, p. 79, ch. 69, held not unconstitutional as a delegation of legislative power to amend municipal charters to municipalities.—Yazoo City v. Lightcap, Miss., 33 So. Rep. 949.

59. CONSTITUTIONAL LAW—Sale of Adulterated Milk.—Where, under a contract to sell milk, plaintiff failed to recover because he sold watered milk, his contract was not impaired by Act April 17, 1893, § 69, declaring the sale of watered milk to be unlawful.—Hecht v. Wright, Colo., 72 Pac. Rep. 48.

60. CONTEMPT—Administrator. — That an administrator, imprisoned for contempt in failing to make good *devastavit*, has been adjudicated a bankrupt, is no reason why he should be discharged from imprisonment.—*In re* Collins, 80 N. Y. Supp. 1119.

61. CONTRACT—Delay in Completing Building.—A building contractor, liable for damages for delay in completion, held not entitled to a deduction for Sundays during the delay. — Vanderhoof v. Shell, Oreg., 72 Pac. Rep. 126.

62. CONVICTS—Trial for Other Offense.—A convict may be taken out of the custody of the warden and compelled to stand trial on another charge. — Clifford v. Dryden, Wash., 72 Pac. Rep. 96.

63. CORPORATIONS—Debts of Officers.—A note executed in the name of a corporation for a transfer of shares of another corporation to its president held the personal obligation of the president.—Wheeler v. Mineral Farm Consol. Min. Co., Colo., 71 Pac. Rep. 1101.

64. CORPORATIONS—Receiver. — On dissolution of corporation, receiver cannot sell assets devested of lien of judgment previously obtained. — *In re* Coleman, N. Y. 66 N. E. Rep. 988.

65. COUNTIES—Taxpayer's Action. — Where taxpayer recovered money misappropriated by county officers, in suits brought for the benefit of the county, the fund was liable for the necessary expenses of such taxpayer and attorney's fees incident to its recovery.—Kimble v. Board of Com'rs of Franklin County, Ind., 66 N. E. Rep. 1023.

66. CRIMINAL LAW — Discharge of Jury. — Under the statute the discharge of the jury in a criminal prosecution on a legal holiday does not bar a subsequent prosecution.—State v. Lewis, Wash., 72 Pac. Rep. 121.

67. CRIMINAL TRIAL — Disqualification of Juror.—Defendant after conviction cannot urge disqualification of a juror for the first time as a ground for a new trial, if he failed to interrogate him on the subject. — State v. Keziah, La. 34 So. Rep. 107.

68. DAMAGES — Condemnation Proceedings. — Adjudication of damages in condemnation proceedings is not an adjudication of damages from subsequent distinct injuries resulting therefrom.—Sultan Water & Power Co. v. Weyerhaeuser Timber Co., Wash., 72 Pac. Rep. 114.

69. DEATH—Measure of Damages. — A parent, suing for the negligent death of his child, is entitled to recover for loss of services, society and comfort. — Corbett v. Oregon Short Line R. Co., Utah, 71 Pac. Rep. 1065.

70. DEPOSITIONS — Right to Introduce. — Where one party has offered a part of a deposition taken by him the other may offer the other part of it.—Curtis v. Parker & Co., Ala., 33 So Rep. 935.

71. DESCENT AND DISTRIBUTION—Bona Fide Purchaser. —Where a foreign will has disposed of real estate in the state in a manner different from what the law would, a purchaser from an heir of the foreign testator, in order to be protected against one claiming under the will, must under Wills Act, § 50, Gen St. 1901, § 7988, show that he procured his title in good faith and without knowledge of the will.—Markley v. Kramer, Kan., 72 Pac. Rep. 221.

72. DESCENT AND DISTRIBUTION—Contract for Divorce. A contract for the procurement of a divorce, giving the wife a very inadequate part of the property, does not bar ther right of inheritance in the husband's estate on his death.—Palmer v. Palmer, Utah, 72 Pac. Rep. 3.

73. DESCENT AND DISTRIBUTION — Failure to Mention Child in Will.—In Arizona a child can be disinherited without being mentioned in a will, unless the omission of his name was through inadvertence or mistake.—*In re* McMillen's Estate, N. M., 71 Pac. Rep. 1083.

74. DIVORCE—Alimony. — A divorced husband cannot escape the obligation to pay alimony by a remarriage, which increases his expenses so as to exhaust his income.—State v. Brown, Wash., 72 Pac. Rep 86.

75. DIVORCE — Notice of Publication. — Defendant in divorce suit served by publication held not harmed by false affidavit of complainant that she did not know his place of residence, and therefore not entitled to vacation of judgment. — Day v. Nottingham, Ind., 66 N. E. Rep. 998.

76. DOMICILE — Evidence of Change. — A change of domicile from one state to another is brought about by the act of residing in the latter state with intent of making it one's home and of renouncing citizenship elsewhere.—Succession of Simmons, La., 34 So. Rep. 101.

77. EJECTMENT — Title to Fee. — A party having the title to the fee of land is entitled to maintain ejectment against one having a mere easement therein, but who takes exclusive possession thereof and appropriates it to his own use, to the exclusion of the owner in fee. — Lott v. Payne, Miss., 33 So. Rep. 948.

78. ELECTRICITY — Inspection of Wires. — An electric company held not relieved of liability, where a span wire had become dangerously charged with electricity, which the company's inspection should have been thorough enough to detect. — Potts v. Shreveport Belt Ry. Co., La., 34 So. Rep. 103.

79. ESTOPPEL—Taxes.—The state is not estopped from claiming its property by the illegal act of the assessor, assessing it in the name of one without the least interest. — Slattery v. Heilperin & Leonard, La., 34 So. Rep. 139.

80. ESTOPPEL — Wife's Separate Property.—A husband, having treated his wife's goods as her separate property at an execution sale against her, held not in position to claim it as community property as against third parties. —Standard Furniture Co. v. Van Alstine, Wash., 72 Pac. Rep. 119.

81. EVIDENCE—Expert Opinion.—Landowner, qualified as an expert in a proceeding to condemn his land for an irrigation reservoir, held entitled to give his opinion as to the likelihood of damage from seepage. — Loloff v. Sterling, Colo., 71 Pac. Rep. 1113.

82. EVIDENCE — Former Judgment. — Judgment between parties to an action held admissible in evidence on the issue of the rights established by the judgment.— Salt Lake City Water & Electrical Power Co. v. Salt Lake City, Utah, 71 Pac. Rep. 1067.

83. EVIDENCE — Question for Jury. — Circumstantial evidence, to sustain a verdict in a civil case, need not rise to that degree of certainty which will exclude every other reasonable conclusion than the one arrived at.— Chicago, R. I. & P. Ry. Co. v. Wood, Kan., 72 Pac. Rep. 215.

84. EXECUTORS AND ADMINISTRATORS — Appraisers.— An administrator has nothing to do with the appointment of appraisers. — O'Brian Bros. v. Wilson, Miss., 33 So. Rep. 946.

85. EXECUTORS AND ADMINISTRATORS — Right to Purchase at Sale. — An administrator may purchase from the purchaser at a sale under a deed of trust, land which originally belonged to the estate.—O'Brian Bros. v. Wilson, Miss., 33 So. Rep. 946.

86. FISH—Right of Fishery.—Exclusive rights of fishery in public waters, through user of tide lands, cannot be acquired by prescription.—Pacific Steam Whaling Co. v. Alaska Packers' Assn., Cal., 72 Pac. Rep. 161.

87. FORCIBLE ENTRY AND DETAINER — Issue of Title.— Where a complaint in forcible entry and detainer alleged that plaintiff was the owner in fee, it was unsupported by proof showing that plaintiff held as a mortgagee in possession. — McGrew v. Lamb, Wash., 72 Pac. Rep. 100.

88. GARNISHMENT — Notice of Intention to Garnish.— There was nothing to fix the liabilty of garnishees in the fact that, before garnishment, plaintiff informed them that he claimed or would claim the funds in their hands. —Curtis v. Parker & Co., Ala., 33 So. Rep. 935.

89. GUARDIAN AND WARD — Tutor Debts to Ward.— Debts of a tutor to his ward do not merge into debts of the tutorship, so as to lose their separate existence.— Thompson v. Vance, La., 34 So. Rep. 112.

90. HOMICIDE — Instruction. — On a prosecution for murder, where there is some substantial evidence to reduce the homicide to manslaughter, it is error to refuse to instruct concerning manslaughter. — State v. Buffington, Kan., 72 Pac. Rep. 213.

91. HOMICIDE — Killing Jailor. — Escaping prisoners, killing keeper, held guilty of murder in the first degree. —People v. Flanigan, N. Y., 66 N. E. Rep. 988.

92. HOMICIDE — Manslaughter. — In a prosecution for homicide, an instruction that, if defendant "aided or abetted" S in killing deceased, he was guilty of manslaughter, held not prejudicial. — People v. Morine, Cal., 72 Pac. Rep. 166.

93. HUSBAND AND WIFE — Action on Note. — In an action on a promissory note, affirmative instruction, with hypothesis on the issue of coverture, held properly given.—Englehart v. Richter, Ala., 33 So. Rep. 939.

94. HUSBAND AND WIFE — Community Creditors.—The right which a community creditor has to be preferred on the sale of the community property, being secured neither by privilege nor mortgage, registry of the claim is unnecessary to enable the creditor to enforce it against third persons who have acquired rights in the property.—Thompson v. Vance, La., 34 So. Rep. 112.

95. HUSBAND AND WIFE — Community Property. — Where property of husband or wife, claimed to be separate property, is not preserved in kind, so that its separate character can be determined, it will be considered community property.—Brown v. Lockhart, N. M., 71 Pac. Rep. 1086.

96. HUSBAND AND WIFE — Community Property. — A husband cannot at will sell property belonging to the community, to pay a community debt to himself from its price, and reinvest the same in separate property. — Sharp v. Zeller, La., 34 So. Rep. 129.

97. HUSBAND AND WIFE — Public Policy. — An agreement between husband and wife, calculated to facilitate the securing of a divorce, is contrary to public policy.— Palmer v. Palmer, Utah, 72 Pac. Rep. 3.

98. INDICTMENT AND INFORMATION — Pleading. — Information need not state that there was no grand jury in session and that accused was committed by magistrate. —State v. Lewis, Wash., 72 Pac. Rep. 121.

99. INTOXICATING LIQUORS — Licenses. — Where a remonstrance against a liquor license was signed by an

attorney duly authorized by a majority of the voters of a township, it was immaterial that it was not signed by the voters.—Shaffer v. Stern, Ind., 66 N. E. Rep. 1004.

100. INTOXICATING LIQUORS — Sale by Agent.—A wife held not liable to the penalty prescribed by Code 1892, § 1590, for the sale of intoxicating liquors at her grocery store, by her husband, contrary to her express orders.—Thurman v. Adams, Miss., 33 So. Rep. 944.

101. JUDGMENT — Dismissal of Action.—The dismissal of a suit in the federal court for want of jurisdiction is not a bar to a suit in the state courts. — Board of Comrs. of Lake County v. Schradsky, Colo., 71 Pac. Rep. 1104.

102. JUDGMENT—Res Judicata.—A judgment overruling a motion by a mortgagee to discharge attached property is not *res judicata*, in an action by the mortgagee against the sheriff and his bondsmen for the conversion of the property. — Bishop v. Smith, Kan., 72 Pac. Rep. 220.

103. JUDGMENT—Res Judicata.—A judgment establishing validity of bonds against an attack for fraud is conclusive in a subsequent suit, even as to defenses not pleaded. — Board of Comrs. of Lake County v. Johnson, Colo., 71 Pac. Rep. 1106.

104. JUDGMENT—Res Judicata.—In action by decedent on note, decree in prior equity suit between executor and plaintiff held not *res judicata* as to the note.—Siebert v. Steinmeyer, Pa., 54 Atl. Rep. 336.

105. JURY — Liquor Statute. — Sp. Laws 1901, p. 314, § 43, conferring jurisdiction on the recorder of the city of Albany, held not an invasion of the constitutional right to trial by jury.—Cranor v. City of Albany, Oreg., 71 Pac. Rep. 1042.

106. JUSTICES OF THE PEACE—Certiorari.—A judgment of a justice of the peace may be reviewed by *certiorari* in cases where no appeal is provided by statute. — Loloff v. Heath, Colo., 71 Pac. Rep. 1113.

107. LANDLORD AND TENANT—Toboggan Slide.—Lessor of public toboggan slide held liable for injury resulting from its defective construction. — Barrett v. Lake Ontario Beach Imp. Co., N. Y., 66 N. E. Rep. 968.

108. LIFE INSURANCE — Death Proofs. — A policy provision requiring proofs of death to be submitted within two months held a condition subsequent, and fulfilled by a submission of proofs within a reasonable time.—Munz v. Standard Life & Accident Ins. Co., Utah, 72 Pac. Rep. 182.

109. LIMITATION OF ACTIONS — Acknowledgment of Barred Claim. — Claim of beneficiary of deceased member of benefit society held taken out of the statute of limitations by proceedings before the board of arbitration, whereby its justice was acknowledged. — Dearborn v. Grand Lodge A. O. U. W., Cal., 72 Pac. Rep. 154.

110. LIMITATION OF ACTIONS—Barred Claim.—It is the plain duty of a municipal board to plead limitations, when it can under the facts. — Trowbridge v. Schmidt, Miss., 34 So. Rep. 84.

111. MARRIAGE — Presumption.—A marriage ceremony performed in another country will be presumed to have been performed in compliance with its laws. — Summerville v. Summerville, Wash., 72 Pac. Rep. 84.

112. MASTER AND SERVANT — Assumed Risk.—The doctrine of assumption of risk has no application to a case where an inexperienced laundry employee is directed to feed a mangle; the work requiring experience, and the employee receiving no instruction, notice or warning of defects.—Coleman v. Perry, Mont., 72 Pac. Rep. 42.

113. MASTER AND SERVANT — Contributory Negligence. — Where a person is employed in the presence of a known danger, to constitute contributory negligence, it must be shown that he voluntarily and unnecessarily exposed himself to the danger.— Potts v. Shreveport Belt Ry. Co., La., 34 So. Rep. 103.

114. MASTER AND SERVANT — Employers' Liability Act. —Employers' liability act, as applied to railroads, held to include railroads in process of construction.—Southern Indiana Ry. Co. v. Harrell, Ind., 66 N. E. Rep. 1016

115. MECHANICS' LIENS — Statement of Materials Furnished.—A mechanic's lien statement was sufficient as to materials furnished by claimant, though it failed to state in express terms that they were furnished by him. —Sickman v. Wollett, Colo., 71 Pac. Rep. 1007.

116. MINES AND MINERALS — Adverse Claim. — Under Rev. Stat. U. S. § 2325, U. S. Comp. St. 1901, p. 1429, one who fails to file an adverse claim to a mining claim within the prescribed time will be conclusively presumed to have none.—Lavagnino v. Uhlig, Utah, 71 Pac. Rep. 1046.

117. MINES AND MINERALS—Cancellation of Entry.— The mere cancellation of an entry of a mining location does not render the ground open to relocation.—Rebecca Gold Min. Co. v. Bryant, Colo., 71 Pac. Rep. 1110.

118. MINES AND MINERALS—Extralateral Rights.—Provided no forcible entry is made, a junior locator may project the end line of his claim across the surface of a senior location, for the purpose of fixing extralateral rights to so much of the vein as is subject to location.— Davis v. Shepherd, Colo., 72 Pac. Rep. 57.

119. MORTGAGES—Ward's Right to Incumber Interest. —A ward, on attaining his majority, may incumber by mortgage his interest in any real estate held in the name of his guardian for his benefit.—Shoop v. Stewart, Kan., 72 Pac. Rep. 219.

120. MUNICIPAL CORPORATIONS—Barred Claim.—Payment of barred claim by municipal corporation is *ultra vires*.—Towbridge v. Schmidt, Miss., 34 So. Rep. 84.

121. MUNICIPAL CORPORATIONS — Challenging Municipal Acts.—A mere citizen and taxpayer is without standing to challenge the acts of the municipality, unless he can show a special interest growing out of the likelihood of his tax being increased.—State v. Kohnke, La., 33 So. Rep. 793.

122. MUNICIPAL CORPORATIONS—Limitation of Indebtedness.—Const. art. 14, §§ 3, 4, vest the legislature with power to authorize cities to incur an additional indebtedness for water, light, or sewer purposes, not exceeding 4 per cent. of the value of the taxable property therein.—State v. Quayle, Utah, 71 Pac. Rep. 1060.

123. MUNICIPAL CORPORATIONS—Ultra Vires Contract. —Where a city embarks on an *ultra vires* public improvement, the action of its council in rescinding an acceptance of a bid for such improvement held proper.—McKee v. City of Greensburg, Ind., 66 N. E. Rep. 1009.

124. NAVIGABLE WATERS—Bridges. — In the absence of congressional legislation relative thereto, a state may authorize the building of a bridge over a navigable interstate stream.—Kansas City, M. & B. R. R. Co. v. J. T. Wiygul & Son, Miss., 33 So. Rep. 965.

125. NEGLIGENCE—Care Required of Parent.—A parent is only required to exercise ordinary care to prevent injury to his child.—Corbett v. Oregon Short Line R. Co., Utah, 71 Pac. Rep. 1065.

126. NEGLIGENCE—Passenger in Vehicle.—A passenger in a vehicle injured by a defect in a street, having no control of the driver, is not chargeable with the latter's negligence, in the absence of negligence on his part.— Shearer v. Town of Buckley, Wash., 72 Pac. Rep. 76.

127. PARTNERSHIP—Modification of Agreement. — Surrender of right to withdraw from partnership held a good consideration for agreement modifying articles of copartnership.—Melville v. Kruse, N. Y., 66 N. E. Rep. 965.

128. PARTNERSHIP—Suit for Accounting.—Where there had been no settlement between partners for a particular year, during which a loss had accrued, plaintiff's share thereof should have been included in a suit for an accounting.—Yarwood v. Billings, Wash., 72 Pac. Rep. 104.

129. PAYMENT — Application. — The creditor, having once applied a payment to the discharge of a particular indebtedness of his debtor, is bound by the application. —White v. Costigan, Cal., 72 Pac. Rep. 178.

130. PHYSICIANS AND SURGEONS—Dentists' Registration.—Sess. Laws 1893, p. 88, ch. 55, as amended by Laws 1901, p. 314, ch. 152, providing for the examination and li-

censing of persons engaging in the practice of dentistry, is constitutional.—State v. Board of Dental Examiners, Wash., 72 Pac. Rep. 110.

131. PLEADING—Amendment After Evidence.—It is not error to refuse permission to amend a complaint by adding another count, after plaintiff's evidence has shown that he has no right to recover. — Nash v. Southern Ry. Co., Ala., 33 So. Rep. 932.

132. PRINCIPAL AND AGENT — Liability on Mortgage. — Where agent of mortgagor misappropriates money obtained from the mortgagee, the mortgagor is liable for the amount of the loan. — Henken v. Schwicker, N. Y., 66 N. E. Rep. 971.

133. PROCESS—Amendment.—If a writ is amendable, it will be accorded the same effect, with reference to acts done in execution of it, as if it had been amended.—Brann v. Blum, Cal., 72 Pac. Rep. 168.

134. PROHIBITION—Discharged Receiver.—Prohibition held to lie to prevent the court from punishing relator for contempt for interfering with certain property in the hands of a discharged receiver.—State v. Superior Court of Spokane County, Wash., 71 Pac. Rep. 1095.

135. PROHIBITION—Propriety of Suit.—Prohibition will not issue to restrain a court from proceeding with a suit after overruling motion to dismiss for want of jurisdiction.—State v. Superior Court of Kitsap County, Wash., 71 Pac. Rep. 1100.

136. PUBLIC LANDS—Effect of Land Department Decisions.—Though the decisions of the United States land department on matters of law are not binding on courts, they should not be overruled unless they are clearly erroneous. — Lavagnino v. Uhlig, Utah, 71 Pac. Rep. 1046.

137. PUBLIC LANDS—Mexican Land Grants.—The action of congress in confirming a claim for land under a grant made by Mexico cannot be revised by the courts.—Catron v. Laughlin, N. M., 72 Pac. Rep. 26.

138. QUO WARRANTO — Trustee of Public School. — A trustee of a public school is an officer, within the meaning of the statute providing a remedy by *quo warranto* against persons unlawfully holding office. — Ellis v. Greaves, Miss., 34 So. Rep. 81.

139. RAILROADS — Duty to Tresspasser. — A railroad must use reasonable diligence to discover trespasser on a part of the track habitually used by the public.—Corbett v. Oregon Short Line R. Co., Utah, 71 Pac. Rep. 1065.

140. RAILROADS—Fire from Engine Sparks.—In an action for damages caused by fire from sparks from an engine, evidence that other trains caused fires at other times than that alleged in the complaint held admissible under the pleadings. — Noland v. Great Northern Ry. Co., Wash., 71 Pac. Rep. 1098.

141. RECEIVERS — Termination of Authority. — A receivership should terminate where the cause is determined and accounts settled.—State v. Superior Court of Spokane County, Wash., 71 Pac. Rep. 1095.

142. SPECIFIC PERFORMANCE—Estoppel.— The signing of a bill for specific performance by O as solicitor for complainant held not a pleading of an estoppel by O to question defendant's right to convey to complainant.—Farmer v. Sellers, Ala., 33 So. Rep. 829.

143. STATUTES — Repugnancy. — Repugnancy between two criminal statutes may arise, and a consequent repeal by implication, though the penalty imposed falls under the limits of the law laid down in each statute.—State v. Callahan, La., 33 So. Rep. 981.

144. TAXATION — City Water Works. — Under Gen. St. 1901, §§ 1017, 7054, a waterworks plant owned and operated by a city is exempt, though the water is furnished to citizens at prescribed rentals.—Board of Com'rs of Sumner County v. City of Wellington, Kan., 72 Pac. Rep. 216.

145. TAXATION—Tax Sale.—Title passes by a tax sale of state property, assessed in the name of one without any interest therein.—Slattery v. Heilperin & Leonard, La., 34 So. Rep. 139.

146. TAXATION—Tax Title.—The holder of a tax title cannot insist that a redeemer has not made sufficient payment, where the county has made a certificate purporting to be a receipt for the sum in full, and is not a party to the action.—Meagher v. City of Sprague, Wash., 72 Pac. Rep. 108.

147. TELEGRAPHS AND TELEPHONES—Failure to Deliver Message.—In an action against a telegraph company for failure to deliver a message announcing the approaching death of a son, damages for mental pain and anguish held recoverable.—Graham v. Western Union Tel. Co., La., 34 So. Rep. 91.

148. TENANCY IN COMMON—Limitations.—An entry by a co-tenant under a deed purporting to convey the whole estate held to start the running of limitations as to his liability to account for rents and profits. — Armijo v. Neher, N. M., 72 Pac. Rep. 12.

149. TENANCY IN COMMON — Rents and Profits.—A co-tenant, holding adversely under a deed purporting to convey the whole estate, held liable for interest on rents and profits due to his co-tenants, notwithstanding their failure to demand the same.—Armijo v. Neher, N. M., 72 Pac. Rep. 12.

150. TIME—Computation. — Where an attack on the validity of a special assessment is limited by Gen. St. 1901, § 766, to within 30 days after the ascertainment of its cost, in computing the time the day on which the assessment is ascertained is to be included. — Kansas City v. Gibson, Kan., 72 Pac. Rep. 222.

151. TRIAL—Comment of Court. — A comment of the court on the introduction of a copy of a written instrument, when explained by subsequent testimony and instructions, held not prejudicial.—Nunn v. Jordan, Wash., 72 Pac. Rep. 124.

152. TRIAL—Exclusion of Witness.—Violation by a witness of a rule of exclusion held not cause for refusing to allow the witness to testify, in the absence of any showing of connivance or relationship. — Bahrman v. Terry, Colo., 71 Pac. Rep. 1118.

153. TRIAL — Instruction. — Though sentences in a charge, taken alone, may need some qualification, yet, if such qualification be given in the context, there is no error.— Redhing v. Central R. Co., N. J., 54 Atl. Rep. 481.

154. TRIAL — Severance. — A codefendant to a suit on a promissory note is not entitled to a severance on her plea of coverture. — Englehart v. Richter, Ala., 33 So. Rep. 989.

155. TROVER AND CONVERSION — Void Purchase.—That parties in possession of goods have obtained them under a void contract of purchase does not justify another in wrongfully taking the goods from them.—Standard Furniture Co. v. Van Alstine, Wash., 72 Pac. Rep. 119.

156. TRUSTS — Lien. — That beneficiary obtained judgment against his trustee for moneys misappropriated held not to affect his right to a lien on the lands in which the moneys were invested. — Citizens' Bank v. Rucker, Cal., 72 Pac. Rep. 46.

157. TRUSTS—Purchase of Realty.—A resulting trust in favor of one furnishing money for the purchase of real estate cannot arise against the intent of the parties.—Funk v. Hensler, Wash., 72 Pac. Rep. 102.

158. TRUSTS—Usufructuary.—A person to whom, out of the revenues of an estate, a certain amount is to be paid monthly, is not a usufructuary. — Succession of Ward, La., 34 So. Rep. 135.

159. USURY — What Law Governs. — A note and mortgage executed by a resident of Alabama to a Minnesota building company held not governed by the usury laws of Alabama.—United States Savings & Loan Co. v. Beckley, Ala., 33 So. Rep. 934.

160. WATERS AND WATER COURSES — Abandonment.— Proprietor of water diverted into his canal did not abandon his appropriation thereof by entering into a contract with another for the enlargement and joint use thereof.—Stoner v. Man, Wyo., 72 Pac. Rep. 193.